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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

SHANE MORONI MARTINEZ,

Defendant and Appellant.

H045266

(Monterey County

Super. Ct. No. SS160788A)

A jury convicted defendant Shane Moroni Martinez of driving under the influence of alcohol (DUI) (Veh. Code, § 23152, subd. (a);<sup>1</sup> count 1) and driving with a 0.08% or higher blood alcohol level (§ 23152, subd. (b); count 2). The jury also found true for each count an allegation that Martinez had a prior DUI conviction (§ 23550.5).

Martinez contends on appeal that his convictions should be reversed because the trial court abused its discretion when it admitted Martinez's prior DUI conviction and failed to bifurcate the trial on the prior conviction allegations. Relatedly, Martinez contends that his defense counsel rendered ineffective assistance of counsel when he failed to argue for exclusion of the prior DUI conviction and a bifurcated trial on the ground that the prior conviction was not an element of the charged offenses. In addition,

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<sup>1</sup> All further statutory references are to the Vehicle Code unless otherwise indicated.

Martinez contends that the prosecutor committed prejudicial misconduct when cross-examining Martinez, and that defense counsel provided ineffective assistance when he failed to object to the prosecutor's cross-examination.

We reject Martinez's claims and affirm the judgment.

## **I. FACTS AND PROCEDURAL BACKGROUND**

### *A. Procedural Background*

Martinez was charged by information with two counts of drunk driving on January 31, 2016. In count 1, the information alleged that Martinez drove a vehicle while under the influence of alcohol (§ 23152, subd. (a)). In count 2, the information alleged that Martinez drove a vehicle with a 0.08% or higher blood alcohol level (§ 23152, subd. (b)). The information also alleged for each count that Martinez suffered a prior felony conviction in 2007 for a violation of section 23153, subdivision (b) (§ 23550.5).

Prior to trial, the prosecution filed an in limine motion seeking to introduce Martinez's prior DUI conviction to impeach him and to prove the existence of the prior conviction as "an element of the charged offense." Martinez filed a trial brief opposing admission of the prior conviction under Evidence Code section 352 and requesting that the "trial on the prior DUI conviction be bifurcated." Defense counsel did not argue that the prior conviction was not an element of the charged offense.

At a hearing on the in limine motion, defense counsel said that Martinez would "stipulate to" and "admit the prior . . . so there is no need for that to go before the jury as a proof issue in this case." The trial court stated its belief that, regardless of the stipulation, the prior conviction "still goes in front of the jury" "because it's an element of the offense." Defense counsel conceded that impeachment with a prior felony conviction was permissible but argued that the prosecutor did not have to prove the prior conviction "as long as there is an admission." Defense counsel further stated that Martinez would admit during his testimony that he had suffered a prior felony conviction (without specifying the nature of the conviction) and it would not be necessary to inform

the jury that the conviction was for DUI. Defense counsel also argued that admission of the nature of the prior conviction would be substantially more prejudicial than probative under Evidence Code section 352.

The trial court ruled that Martinez could be impeached with his prior felony DUI conviction and noted its intent to “indicat[e] ‘a felony driving under the influence conviction’ ” when reading to the jury the allegations contained in the information. The trial court ordered that, if Martinez testified, the prosecutor could not refer to the prior conviction “as ‘driving under the influence, causing injury,’ but simply ‘a felony, driving under the influence offense.’ ” The trial court reiterated that the jury would learn about the prior conviction even if Martinez decided not to testify, because it was an element of the charged offenses.

At trial, Martinez testified in his own defense and admitted that he had a prior DUI felony conviction in 2007. After Martinez testified but before the close of evidence and instruction of the jury, the trial court discussed the wording of potential jury instructions with counsel and Martinez. The trial court stated that, after consulting case law, it had determined that “the prior DUI isn’t an element of the offense here; it’s simply a sentencing enhancement.” The court said that “it doesn’t matter now because [Martinez had] testified and it came out.” The court acknowledged that a trial should generally be bifurcated, or the jury should not be told of the prior DUI sentencing enhancement if a defendant stipulates to its existence, but reiterated that, in this case, the prior conviction had also been admitted for the purpose of impeachment.

The court read the following “stipulation” to the jury prior to closing arguments over defense objection: “So we do have one stipulation in this case, and I don’t think it will be a surprise to you given the testimony from both side[s]. But the parties in this case stipulate that the defendant was convicted of a felony violation of Vehicle Code Section 23153(b), a driving under the influence offense, in the Superior Court of Santa Clara County in Case No. CC637926, on or about March 2 of 2007, which is within ten

years of this alleged offense. So again, you are to take that fact as having been conclusively proved in this case.”<sup>2</sup> The trial court instructed the jury to “[c]onsider the evidence presented on [the prior conviction] allegation only when deciding whether the defendant was previously convicted of the crime alleged, or for the limited purpose of assessing the credibility of the defendant. Do not consider this evidence for any other purpose.”

The jury found Martinez guilty of driving under the influence of alcohol on count 1 and driving with a 0.08% or higher blood alcohol level on count 2. The jury also found true the prior DUI allegation for both counts.

At sentencing, the trial court denied probation and sentenced Martinez to two years in state prison on count 1, and two years in state prison concurrently on count 2, which was stayed pursuant to Penal Code section 654. Martinez timely appealed.

*B. The Evidence Presented at Trial*

*1. The Prosecution Evidence*

Martinez and his friend Joshua Hernandez went to a bar in Gonzales, California, until approximately 2:00 a.m. They then went to Hernandez’s house but subsequently left for Martinez’s house. Hernandez testified that the two men got into Martinez’s car, and Martinez drove north toward Salinas on Highway 101 with Hernandez sitting in the passenger seat. Hernandez fell asleep as they headed north and awoke to screeching and being thrown around inside the car. He then realized the car had crashed. Hernandez did not remember whether he talked to anyone at a towing company. Hernandez then crawled to the back seat, unsuccessfully attempted to exit the car, and laid down across the back seat. He next recalled being pulled out of the car by fire department personnel. Hernandez denied driving the car and reiterated that Martinez drove it.

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<sup>2</sup> Defense counsel acknowledged that Martinez had previously stipulated to the prior conviction, but defense counsel said he was “not waiv[ing] any objections that [he] had to it to begin with” and he agreed to the stipulation “subject to all [prior] objections.”

At about 3:00 a.m., an unidentified man called a local towing company asking for a tow, because “he put his car in a ditch” between Gonzales and Salinas. The man calling the towing company could not provide any details about his location. His speech was slurred, and he dragged out his words and took a long time to answer questions. The towing company notified the California Highway Patrol (CHP) about the call for service.

At 3:02 a.m., the CHP dispatched Officers Avila and McDaniel to the reported vehicle collision on Highway 101. The officers did not know the exact location of the incident but were able to obtain the phone number of the reporting person from the towing company. Officer McDaniel called the number—which was Martinez’s cell phone number—and got more details about the location of the crash. The officers continued looking for the collision scene and spotted it at about 3:50 a.m. on the northbound side of Highway 101. They found a white car off the roadway facing in a southwesterly direction. The car had traveled from the highway through a barbed wire fence and almost completely across a drainage ditch. It was raining moderately.

The officers exited their patrol vehicle and approached the car. Martinez was in the driver’s seat of the car with the engine running. Avila asked Martinez if he was okay, and then Avila checked on Hernandez, who was laying in the back seat and did not respond when Avila asked if he was hurt. After summoning an ambulance for Hernandez, Avila asked Martinez if he was the driver of the car. Martinez said he was. McDaniel was about 10 feet away from Martinez when Martinez said that he was the driver. Avila noticed footprints in the mud beside the car, which indicated that someone had walked from the driver’s side to the passenger’s side of the car and back.

Martinez was calm, cooperative, and compliant with Officer Avila throughout their encounter that night. Avila requested that Martinez step out of the car, and he asked Martinez what happened. Martinez said he was going northbound from his friend’s house in Gonzales to his home in Salinas when he hydroplaned and went off the road. Martinez also said he called the towing company. Martinez was wet and muddy and said

he had exited the driver's seat after the crash and walked around the car. Martinez said he had drunk six beers from about 8:00 p.m. to 1:00 a.m. Martinez's speech was slow and deliberate, and he took long pauses when answering questions. Avila smelled the odor of an alcoholic beverage coming from the car and on Martinez's breath and body. Martinez's eyes were shiny, red, and watery. Martinez's condition was consistent with him being under the influence of alcohol. Martinez was the registered owner of the car. Avila and McDaniel assisted Martinez to their patrol vehicle.

Officer McDaniel administered a breath test to Hernandez using a preliminary alcohol screening (PAS) device. Hernandez was "completely incoherent" and incapable of driving. McDaniel helped fire department and ambulance personnel attend to Hernandez while Avila interacted with Martinez. The rescue personnel put Hernandez on a backboard and carried him from the car to an ambulance.

Officer Avila performed two breath tests on Martinez using a PAS device. The device registered readings showing that Martinez had blood alcohol levels of .146 and .159. Avila arrested Martinez and took him to a hospital where his blood was drawn at 5:40 a.m. The blood sample taken from Martinez was tested and had a blood alcohol concentration of .151. An expert in blood analysis opined that, due to the impairments caused by alcohol, most people are unsafe to drive at the .05 to .06 level, and everyone is unsafe to drive at .08 or higher. The expert also opined hypothetically based on the facts of the case that the driver was impaired by alcohol. No witness testified about Martinez's prior felony DUI conviction in the prosecution's case.

## 2. The Defense Evidence

Martinez testified that, on the night in question, he and Hernandez went first to a bar, then to Hernandez's house, and then left for Martinez's house. According to Martinez, Hernandez said he would drive. Martinez gave Hernandez the keys to the car and jumped in the back seat. As Hernandez drove on the highway, the car hydroplaned,

spun out, and crashed. The car was stuck, and Martinez got out to try and push the car, without success. After Hernandez also tried to push the car, Martinez got behind the wheel and tried to move the car. When that did not work, Hernandez offered to call and pay for a tow, and Hernandez used Martinez's phone to call a tow company because Hernandez's phone was dead. Martinez also talked to the tow company and "offered landmarks" as to the location of the crash. Martinez did not drive the car between the time they left Hernandez's house and the crash.

When the CHP officers arrived, Martinez told Officer Avila that he [Martinez] was not driving. After Martinez told Avila four or five times that he was not the driver, Avila unsnapped his firearm and told Martinez to admit to being the driver. Avila said, "This is the way it's going to go down. I want you to admit to me that you're the driver." Martinez admitted he was the driver because he feared for his life.

Although Martinez told Hernandez sometime after the incident that he [Martinez] admitted to being the driver out of fear for his life, Martinez did not tell anyone at the crash scene, the hospital, or the jail that Officer Avila had threatened him and that he really was not the driver. Martinez did not say anything because he was under arrest, was told he would be released in the morning, and feared for his life. Martinez did not file a complaint against Avila or talk to the district attorney's office about what Avila had done.

Martinez testified that he had a felony conviction from 2007 for driving under the influence.

When called by the defense to testify, Hernandez admitted that on the date of the crash he was on informal misdemeanor probation for driving under the influence, so it would have been a violation of his probation if he had driven under the influence.

### 3. Rebuttal Evidence

In the prosecution's rebuttal case, Officer Avila testified that he found Martinez in the driver's seat of his car—not outside it, as Martinez had testified—and neither Avila nor Officer McDaniel ordered Martinez back into his crashed car. Avila's interaction with Martinez that night was never hostile; Martinez was compliant, answered all questions, and admitted being the driver. Avila denied unclicking his holster or unholstering his gun.

Hernandez testified that he was injured during the crash on his chest, right shoulder, right arm, and right side of his torso. At the time of the crash, he was in the front passenger seat wearing a seatbelt that crossed from his right shoulder to his left lap.

In the defense rebuttal case, Martinez reiterated that he never admitted to driving the car when speaking to Hernandez after the crash and before trial. Martinez discussed with Hernandez the fact that he [Martinez] was charged even though he was not the driver that night, and he offered to have Hernandez talk to his defense lawyer, but Hernandez refused. Martinez had no proof substantiating the statements he said Hernandez made.

## **II. DISCUSSION**

Martinez raises two claims of error on appeal. Martinez contends that the trial court abused its discretion when it admitted Martinez's prior DUI conviction and failed to bifurcate his trial on the prior conviction allegations. Martinez also claims that his defense counsel was ineffective for failing to argue that his prior conviction should have been excluded and his trial bifurcated because the prior conviction was not an element of the charged offenses. In addition, Martinez claims that the prosecutor committed prejudicial misconduct when cross-examining Martinez, and that defense counsel was ineffective for failing to object to the prosecutor's improper cross-examination. For the reasons stated below, we reject Martinez's claims.



### *A. Admission of the Prior Felony DUI Conviction*

The trial court admitted evidence of Martinez's prior felony DUI conviction for two reasons—first, as evidence of an element of the charged offense and, second, as impeachment evidence. Both parties agree that the trial court misapprehended the law when it believed that Martinez's prior DUI conviction was relevant to an element of the charged offenses rather than an allegation related only to sentencing. However, the parties dispute whether the trial court abused its discretion when it allowed the jury to hear that Martinez had suffered a prior felony DUI conviction at his unitary trial for the purpose of impeaching his credibility. The parties also dispute whether Martinez was prejudiced by any error related to the admission of his prior felony DUI conviction. We first discuss the trial court's impeachment ruling and then analyze whether Martinez suffered any prejudice from the trial court's denial of Martinez's request to bifurcate his trial and from the trial court's decision to allow the jury to hear that Martinez had suffered a prior DUI conviction.

#### 1. Admission of the Prior Conviction as Impeachment Evidence

On appeal, both parties agree (as do we) that the trial court misunderstood the law when it decided before trial that Martinez's prior DUI conviction was an element of the charged offenses that could be presented to the jury as evidence of the alleged crimes. The prior DUI conviction was relevant only to the allegations set forth in the information pursuant to section 23550.5, subdivision (a), which are sentencing provisions, not elements of the charged DUI offenses. (See *People v. Proffit* (2017) 8 Cal.App.5th 1255, 1259, 1269; *People v. Baez* (2008) 167 Cal.App.4th 197, 204; *People v. Camarillo* (2000) 84 Cal.App.4th 1386, 1392.)

A defendant has a right to stipulate to a prior conviction and thereby preclude the jury from learning of the fact of his prior conviction if the prior conviction is not an element of the offense to be proved to the jury. (*People v. Bouzas* (1991) 53 Cal.3d 467,

480.) Because Martinez requested a bifurcated trial and offered to stipulate to the existence of his prior conviction, the trial court should have considered bifurcation and exclusion of the evidence of Martinez's prior DUI conviction as relevant to the prior conviction allegations; and the court should not have ruled the evidence was relevant to the charged offenses. (*People v. Weathington* (1991) 231 Cal.App.3d 69, 90; *People v. Hall* (1998) 67 Cal.App.4th 128, 134.)

However, because Martinez indicated his intention, prior to trial, to testify in his own defense, we must also examine the trial court's ruling on the district attorney's request to impeach Martinez with his prior felony DUI conviction. "[W]hen it is clear prior to trial that the defendant will testify and be impeached with evidence of the prior conviction, denial of a request for a bifurcated trial generally would not expose the jury to any additional prejudicial evidence concerning the defendant. Under such circumstances, a trial court would not abuse its discretion in denying a defendant's motion for bifurcation." (*People v. Calderon* (1994) 9 Cal.4th 69, 78, citation and fn. omitted.) Thus, the trial court's misapprehension regarding the relevance of the prior DUI conviction to the charged offenses and the question concerning bifurcation of the prior conviction allegations must be considered with the trial court's concurrent decision to admit Martinez's prior felony DUI conviction as impeachment evidence.

"[A]n appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence, including one that turns on the relative probativeness and prejudice of the evidence in question." (*People v. Waidla* (2000) 22 Cal.4th 690, 724.) A trial court's ruling on the use of a prior conviction for impeachment purposes is subject to abuse-of-discretion review.<sup>3</sup> (*People v. Anderson* (2018) 5 Cal.5th 372, 407.)

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<sup>3</sup> The abuse of discretion standard also applies to a trial court's ruling on a request to bifurcate the trial on a prior conviction allegation. (*Calderon, supra*, 9 Cal.4th at pp. 77-78.)

“A witness may be impeached with any prior conduct involving moral turpitude whether or not it resulted in a felony conviction, subject to the trial court’s exercise of discretion under Evidence Code section 352.” (*People v. Clark* (2011) 52 Cal.4th 856, 931.) “When determining whether to admit a prior conviction for impeachment purposes, the court should consider, among other factors, whether it reflects on the witness’s honesty or veracity, whether it is near or remote in time, whether it is for the same or similar conduct as the charged offense, and what effect its admission would have on the defendant’s decision to testify.” (*Ibid.*)

Martinez conceded pretrial that his felony DUI conviction was a crime of moral turpitude. Defense counsel stated that Martinez was willing to admit that he had suffered a prior felony conviction but argued that the nature of the conviction—specifically that it was for a DUI—was unduly prejudicial under Evidence Code section 352. Martinez advances the same argument on appeal and argues further that, if the trial court had been aware that the prior conviction was not an element of the charged offenses, there is a reasonable probability that the trial court would have “sanitized the prior [to exclude mention of DUI] and [would have] bifurcated the trial.”<sup>4</sup>

In reaching its determination that Martinez could be impeached with his prior felony conviction as a felony DUI offense, the trial court stated it was applying the multi-

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<sup>4</sup> We note that Martinez does not argue on appeal that he would not have testified in his own defense or would not have offered to stipulate to the existence of his prior conviction if the trial court had correctly understood that the prior conviction was relevant only to the sentencing provisions. Defense counsel’s apparent claim—when objecting to the jury instruction on the prior conviction allegations—that he only stipulated to the prior conviction because the trial court insisted it was going to admit the prior as an element of the offenses is belied by the pretrial record. Defense counsel offered to “stipulate” and “admit the prior” conviction before the trial court stated its agreement with the prosecution’s erroneous rendition of the law concerning the prior DUI conviction. Moreover, defense counsel’s general assertion in his new trial motion that Martinez “offered to stipulate that [he] had a felony prior for impeachment purposes” also fails to establish that the decision to stipulate resulted from the trial court’s erroneous ruling on the prior conviction-allegation issue.

factor analysis of *People v. Beagle* (1972) 6 Cal.3d 441, as well as Evidence Code section 352. However, the trial court did not clearly address, as a factor separate and apart from its legal misapprehension regarding the defense request for bifurcation and offer to stipulate to the existence of the prior conviction, the fact that Martinez’s prior felony conviction involved the same conduct as the charged offenses. When discussing the impeachment question, the trial court said that the conduct for impeachment purposes could be described as a prior felony DUI, and noted that “any felony, prior felony D.U.I., would have been able to be used as an element to elevate this [i.e., the current offenses] to a felony; correct?” The court then said it was considering “sanitizing the ‘with injury’ part” of the prior conviction based on its review of the *Beagle* factors and “the weighing process under 352.”<sup>5</sup> When discussing sanitization, the court again noted its belief that the prior conviction was “an element and an enhancement here . . . So what would go in front of the jury is, that’s not an issue. Both sides are agreeing that the defendant has a felony driving under the influence offense, for purposes of this prior felony conviction.” The trial court ultimately ruled that Martinez could be impeached with his prior felony DUI conviction and reiterated that the jury would learn about the prior conviction even if Martinez did not testify, because it was an element of the charged offenses.

We acknowledge that there is no automatic bar to prior convictions that are similar or identical to the charged offense being used for impeachment. (*People v. Green* (1995) 34 Cal.App.4th 165, 183.) However, the record here raises a substantial question whether the trial court abused its discretion when it conflated its misunderstanding of the law as to

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<sup>5</sup> The *Beagle* factors the trial court considered included that Martinez’s prior felony conviction was “somewhat remote” “[b]ut not substantial[ly]” so (i.e., it occurred in 2007, 9 years before the current offense). The court also asked the prosecutor whether Martinez suffered other convictions between the prior and the current offense, to which the prosecutor responded that Martinez had at least four convictions for driving with a suspended license and one for being drunk and disorderly. In addition, the court considered Martinez’s age at the time of his prior offense (20 or 21 years old).

the elements of the charged offenses with the impeachment analysis and allowed Martinez to be impeached with the DUI aspect of his prior felony conviction.<sup>6</sup>

We need not decide on this record whether the trial court abused its discretion when it rejected the request for bifurcation of the trial on the prior DUI conviction allegations and allowed Martinez to be impeached with the DUI aspect of his prior felony conviction. Instead we examine, if the trial court erred, whether Martinez was prejudiced by the error.

## 2. Prejudice

Martinez argues that he was prejudiced by the trial court's misapprehension that the prior DUI conviction was an element of the charged offenses; its failure to bifurcate the trial on the prior conviction allegations; its instruction to the jury by stipulation that Martinez had been convicted of a felony DUI in 2007; and by its failure to grant defense counsel's request to omit any reference to the subject matter of his prior felony conviction. In addition, Martinez argues that he was prejudiced by defense counsel's failure to inform the trial court that the prior conviction was not an element of the substantive offenses.

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<sup>6</sup> Speaking in retrospect about its impeachment ruling, the trial court said to defense counsel, "If you now have an argument as to the nature of the conviction being a felony, I don't know that I would have sanitized it anyway. I find that most people, if it's a low-level felony, want the jurors to know [the nature of the felony] so they're not speculating that it was attempted murder or something like that he was convicted of. [¶] So now that I've preempted that, you can still go ahead and make an argument." Defense counsel responded by noting that he argued pretrial that the DUI nature of the prior felony conviction was unduly prejudicial. Contrary to the Attorney General's contention that the trial court likely would have admitted the prior conviction for both impeachment and sentence enhancement even if defense counsel had pointed out the correct law pretrial, neither this exchange between the trial court and counsel nor the trial court's subsequent ruling on the new trial motion establishes that the trial court assuredly would have ruled the way it did pretrial regarding sanitization if it had known that the prior conviction was not an element of the offenses.

The trial court's erroneous failure to exclude evidence of Martinez's prior DUI conviction as to the sentencing allegations is state law error subject to the *Watson* test. (*People v. Watson* (1956) 46 Cal.2d 818, 836; see also *Bouzas, supra*, 53 Cal.3d at p. 481.) The erroneous admission of a prior felony conviction for impeachment also is reviewed for prejudice under *Watson*. (*People v. Castro* (1985) 38 Cal.3d 301, 319.) The *Watson* test asks whether it is reasonably probable the defendant would have obtained a more favorable verdict if the improper evidence had not been admitted. (*Watson, supra*, 46 Cal.2d at p. 836.) Similarly, as to Martinez's claim that his defense counsel was ineffective, Martinez must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."<sup>7</sup> (*Strickland v. Washington* (1994) 466 U.S. 668, 694.)

Martinez's prior DUI conviction was not central to the prosecution's case. The prosecution did not present evidence of Martinez's prior DUI conviction in its case-in-chief. Although the prosecutor asked Martinez on cross-examination if he had been convicted of felony DUI, the prosecutor only briefly mentioned Martinez's prior conviction in his closing argument when addressing the prior conviction allegations, saying that "it's really not an issue, but because there's been a stipulation, but the defendant has a prior felony DUI conviction in the last ten years. . . It's an undisputable fact, but it is something that we need to prove, and it's proven by the stipulation." When addressing the issue of witness credibility in his argument, the prosecutor did not argue to the jury that Martinez's felony conviction was one of the factors it could consider when

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<sup>7</sup> Because we conclude below that Martinez did not suffer prejudice under *Strickland*, we do not reach the question whether, as Martinez asserts, his defense counsel provided constitutionally deficient representation. (See *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1008 ["If a defendant has failed to show that the challenged actions of counsel were prejudicial, a reviewing court may reject the claim on that ground without determining whether counsel's performance was deficient."])

evaluating his testimony. In addition, defense counsel told the jurors in his closing argument that the trial court would instruct them that Martinez's prior conviction was "not evidence of guilt in this case." The trial court subsequently instructed the jury to "[c]onsider the evidence presented on [the prior conviction] allegation only when deciding whether the defendant was previously convicted of the crime alleged, or for the limited purpose of assessing the credibility of the defendant. Do not consider this evidence for any other purpose."

The jury learned nothing about Martinez's prior conviction other than it was for a felony DUI over nine years earlier. No witness other than Martinez testified to the conviction, and the jury learned nothing other than the DUI conviction had occurred. Moreover, the jury was specifically instructed not to infer that Martinez was guilty of the charged offenses from the fact that he suffered a prior DUI conviction. "Jurors are presumed able to understand and correlate instructions and are further presumed to have followed the court's instructions." (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.)

We agree with Martinez that his defense rested on his credibility, but the overwhelming evidence of Martinez's guilt reinforces our conclusion that Martinez did not suffer prejudice from the limited evidence admitted about his prior DUI conviction. Hernandez testified that Martinez was the driver of the car, and Hernandez's injuries were consistent with him being in the front passenger seat when the car crashed. The two CHP officers who responded to the crash testified that Martinez admitted to driving the car. Martinez was sitting in the driver's seat when the officers approached the crash scene. By contrast, Hernandez was incoherent and unable to drive or communicate with the officers. The call to the tow truck company came from Martinez's cell phone, and the caller stated on the phone that he had "put his car in a ditch." Martinez was the registered

owner of the car. Martinez told no one until trial that Officer Avila had unbuckled his holster and forced [Martinez] to admit that he was driving the car.<sup>8</sup>

Based on the overwhelming evidence against Martinez and the limited information admitted about his prior DUI conviction, we conclude the trial court's errors were harmless under the *Watson* standard, in that it is not reasonably probable that had the errors not occurred a more favorable result would have ensued. For the same reasons, we also conclude under *Strickland* that Martinez was not prejudiced by any deficiency in defense counsel's performance. We reject Martinez's argument that there is a reasonable probability that, but for counsel's unprofessional errors (if any), the result of the proceeding would have been different.

#### B. *Prosecutorial Misconduct*

Martinez contends that the prosecutor committed misconduct by posing argumentative questions to Martinez about his "story" and his accusations of police coercion, and by improperly vouching when the prosecutor suggested through his questions, his inside knowledge of the facts and personal disbelief of Martinez's testimony. Martinez also asserts that he did not forfeit his challenge to the allegedly improper questions because additional objections by defense counsel at trial would have been futile. Martinez claims that the alleged misconduct cumulatively amounts to a prejudicial due process violation. Finally, Martinez claims that, if this court finds his challenge to the prosecutor's conduct was not preserved for appellate review by defense counsel's objections, his defense counsel was prejudicially ineffective for failing to object.

The Attorney General counters that Martinez's defense counsel largely failed to object to the alleged misconduct, and defense counsel could have had a tactical purpose

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<sup>8</sup> After trial, the trial court mentioned that Martinez persisted in his claim that he was not the driver and stated its view on his claim: "I heard the testimony at trial. That's just not believable. [The] [j]ury didn't believe him."



for not objecting to the cross-examination. The Attorney General also argues that there was no misconduct because Martinez's defense was that the two CHP officers who responded to the crash and Martinez's friend Joshua Hernandez were lying; and the prosecutor properly challenged that contention with his cross-examination and impeachment of Martinez; and the prosecutor did not improperly vouch based on extraneous information. Lastly, the Attorney General argues that Martinez was not prejudiced by any alleged error.

"The applicable federal and state standards regarding prosecutorial misconduct are well established. A prosecutor's intemperate behavior violates the federal Constitution when it comprises a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." (*People v. Hill* (1998) 17 Cal.4th 800, 819, citations and punctuation omitted; see also *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643.)

Generally, a defendant may not raise a claim of prosecutorial error on appeal unless he made a timely and specific objection to the alleged misconduct and requested that the jury be admonished to disregard the impropriety. (*Hill, supra*, 17 Cal.4th at p. 820.) "[But] [a] defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile." (*Ibid.*)

We accept Martinez's argument that his challenges to the prosecutor's questions were preserved for appellate review and that further objection by defense counsel to other questions that Martinez now contests would have been futile. From our review of the record and Martinez's argument, we find few instances where defense counsel failed to object to questions that Martinez now claims were improper, and those failures followed related objections that had been overruled. The Attorney General does not address

Martinez’s futility argument with any specificity in his brief and simply states that Martinez “acknowledges that much of what [he] now objects to was not objected to at trial,” and “[t]o the extent there were no objections made when they would have been meritorious, [Martinez’s] claim of misconduct should be deemed forfeited on appeal.” We disagree with the characterization that “much of” Martinez’s current grievances were not objected to at trial. By this court’s count, Martinez’s defense counsel entered approximately two dozen objections during the prosecutor’s cross-examination of Martinez—which spans only 23 pages of the trial transcripts—and about three-quarters of defense counsel’s objections were sustained. The prosecutor aggressively cross-examined Martinez, asking many questions that drew objections, most of which the trial court sustained. Under these limited circumstances, we conclude that defense counsel’s failure to object to the few questions that Martinez now claims—for the first time—were misconduct may be excused as futile and those questions can be reviewed along with his preserved challenges on appeal. (See *Hill, supra*, 17 Cal.4th at p. 821; *People v. Zambrano* (2004) 124 Cal.App.4th 228, 237.)<sup>9</sup>

Martinez points out that, during his cross-examination, the prosecutor repeatedly referred to Martinez’s version of events as his “story,” asked whether Martinez knew that Officer Avila could be fired for confronting and coercing a civilian with a gun and whether Martinez appreciated the gravity of his accusation, called Martinez a convicted felon, and asked if Martinez had saved his testimony about his version of events for the trial. Martinez contends that the prosecutor’s questions demonstrated a personal disbelief that was akin to vouching, were argumentative, and evinced a belief that Avila was credible because he could get fired for threatening Martinez.

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<sup>9</sup> In light of this conclusion, we do not reach Martinez’s argument that his defense counsel was constitutionally ineffective for failing to object to all the cross-examination questions he challenges on appeal.

We do not agree with Martinez that the prosecutor's questioning amounted to misconduct. We do not overlook the fact that the prosecutor asked several argumentative, speculative, and repetitive questions to which the trial court sustained defense counsel's objections. But when we consider the challenged conduct in its context, we cannot conclude that the prosecutor's questioning was "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process," or that the prosecutor used a method to persuade the jury that was "deceptive" or "reprehensible." (*Hill, supra*, 17 Cal.4th at p. 819.)

"[M]erely asking a question to which an objection is sustained does not itself show misconduct." (*People v. Freeman* (1994) 8 Cal.4th 450, 495.) Moreover, "[w]here a defendant takes the stand and makes a general denial of the crime with which he is charged, the permissible scope of cross-examination is very wide. When a defendant voluntarily testifies in his own defense the People may fully amplify his testimony by inquiring into the facts and circumstances surrounding his assertions, or by introducing evidence through cross-examination which explains or refutes his statements or the inferences which may necessarily be drawn from them." (*People v. Harris* (1981) 28 Cal.3d 935, 953, citation and internal quotation marks omitted; see also *People v. Dykes* (2009) 46 Cal.4th 731, 764.) A prosecutor may challenge a testifying defendant's veracity by contrasting it with other contrary evidence. (See *People v. Watkins* (2012) 55 Cal.4th 999, 1031-1032.)

Here, Martinez's rendition of what happened was in direct conflict with the testimony of the prosecution witnesses. Referring to Martinez's testimony and version of events as his "story" and asking some argumentative questions was not inflammatory, egregious, deceptive, or reprehensible. The same is true for the prosecutor mentioning Martinez's status as a convicted felon—which, of itself, was properly a subject for impeachment. (*Hill, supra*, 17 Cal.4th at p. 819; see also *People v. Friend* (2009) 47 Cal.4th 1, 32.)

As for Martinez's claim that the prosecutor demonstrated personal knowledge of facts outside the record and vouched for Officer Avila by asking questions about the professional risk Avila might face because of the alleged coercion, the jury ultimately heard from Avila that, if he lied about his arrests, he could lose his job. Similarly, an allegedly improper question about Avila's demeanor did not demonstrate the prosecutor's personal belief in Avila's credibility; the question specifically referenced Avila's in-court testimony and the opportunity to observe his demeanor. Accordingly, we conclude that the prosecutor did not commit misconduct during his cross-examination of Martinez. In turn, we also reject Martinez's argument that he was prejudiced by cumulative error resulting from the prosecutor's conduct. Because we conclude there was no misconduct, there is no error for us to aggregate.

For these reasons, we reject Martinez's contention that we must reverse his conviction due to the prosecutor's conduct at trial.

### **III. DISPOSITION**

The judgment is affirmed.

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DANNER, J.

WE CONCUR:

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GREENWOOD, P.J.

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GROVER, J.

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